October Term, 1973

Nos. 73-854, 73-964, 73-1039

IN THE MATTER OF

PENN CENTRAL TRANSPORTATION COMPANY,
Debtor

DAVID C. BEVAN, *Petitioner in No. 73-584*
ALLEN J. GREENOUGH, *Petitioner in No. 73-964*
TWENTY-ONE RETIRED EMPLOYEES,
Petitioner in No. 73-1039

v.

TRUSTEES OF PENN CENTRAL TRANSPORTATION COMPANY

BRIEF FOR RESPONDENTS IN OPPOSITION

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COUNTER-STATEMENT OF ISSUES PRESENTED

1. Did the United States District Court for the Eastern District of Pennsylvania (Reorganization Court) in the proceedings for the reorganization of Penn Central Transportation Company (Penn Central) properly exercise its discretion in denying preferential payment to the participants of The Penn Central Contingent Compensation Plan (CCP) of the entire amounts due them under the CCP on account of services rendered to Penn Central prior to the institution of the reorganization proceedings?

2. Are the assets of the Contingent Compensation Reserve Fund (Reserve Fund) maintained by Penn Central for the purpose of meeting its obligations under the CCP to retired participants the property of the Trustees of the Property of Penn Central (Trustees), free and clear of any claims of the participants, in view, *inter alia*, of the express language of the CCP which provides:

> The Fund shall not be a trust fund and the assets therein shall be available at all times for any corporate purpose of the Company. A participant shall have no right in or to any funds or property which may be held in the Fund?

3. Did the Reorganization Court properly exercise its discretion in imposing a $50,000 per annum limitation upon the payment of unfunded retirement benefits to each of six retired highly paid executives of Penn Central?

COUNTER-STATEMENT OF THE CASE

The instant matter arises out of the affirmance by the United States Court of Appeals for the Third Circuit (Court of Appeals) of Order No. 1087 of the Reorganization Court. Order No. 1087 authorizes the Trustees:

> (1) to continue in existence, and to make payments to retired employees under, Penn Central's several funded and unfunded retirement programs;
>
> (2) to make partial payments during reorganization, in the approximate total amount of $2.6 million, as cash permits, to the participants of the CCP, in accordance with a formula approved by the Trustees and accepted by 81 of the 121 participants, without prejudice to the further determination of the participants' claims for payment of their full accounts in the CCP; and
>
> (3) To make additional contributions to the independent trust which funds the Penn Central Plan for Supplemental Pensions (Supplemental Pension Plan).

The payments to be made by the Trustees under Order No. 1087 are subject to an express condition limiting the annual unfunded benefits receivable by anyone of Penn Central's former employees under all of the retirement programs and the CCP to $50,000 per year.[1] This limitation applicable to only six of Penn Central's former executives, does not affect payment of benefits in excess of $50,000 solely out of the funded Supplemental Pension Plan.[2]

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1. The limitation was originally imposed by the Reorganization Court by Order No. 12, dated July 10, 1970, which was applicable to all pensions payable to retired employees, including payments out of the Supplemental Pension Plan.

2. As a consequence, the annual pensions payable to petitioners Symes (No. 73-1039) and Greenough (No. 73-964) under the Supplemental Pension Plan, which were reduced to $50,000 by Order No. 12 of the Reorganization Court, have been reinstated to the full amounts ($52,776.12 in the case of Symes and $68,478.60 in the case of Greenough) due them under the Plan.

The Reorganization Court, in Order No. 1087, further declared that the assets of the Reserve Fund established under the CCP, having an approximate value of $10 million, were the property of the Trustees, free and clear of any claims by the participants, and in an accompanying Order, No. 1088, directed the liquidation of the Reserve Fund. Order No. 1088 required the Trustees to set aside in reserve out of the assets or proceeds of the Reserve Fund the amount of $2.6 million to meet the payments authorized under Order No. 1087, and authorized the Trustees to utilize the remaining $7.4 million to meet current expenses of operating Penn Central's railroad.

Both the Reorganization Court and the Court of Appeals refused to stay the liquidation authorized under Order No. 1088. As a consequence, the Reserve Fund has been liquidated and the proceeds have been applied in accordance with Order No. 1088, *i.e.*, $2.6 million has been reserved for the participants and the balance has been expended for current operating expenses.

Appeals were taken from Orders No. 1087 and 1088 on behalf of 32 retired executives of Penn Central, or estates of deceased executives, who were participants in the CCP, including the six individuals affected by the $50,000 limitation. These appeals were consolidated for argument before the Court of Appeals and, on August 21, 1973, the Court of Appeals rendered a decision affirming Orders Nos. 1087 and 1088. In this respect, the Court of Appeals expressly held that the assets of the Reserve Fund were not trust funds and that the participants in the CCP merely had unsecured claims against the Penn Central estate for the amount of their interests in the plan. It was further determined that the Reorganization Court had not abused its discretion by limiting the payment out of the estate of unfunded benefits due retired employees of Penn Central both under the CCP and Penn Central's other retirement programs.[3] Applications for rehearing were denied by the Court of Appeals on October 9, 1973.

3. One judge dissented in part only insofar as the Reorganization Court had denied payment to one of the appellants, petitioner

There is presently before this Court a total of three petitions for writs of certiorari, involving twenty-three petitioners, seeking review of the Court of Appeals' decision. This brief is submitted in response to all three petitions.

The facts with respect to Penn Central's retirement programs, the CCP and the effect of the $50,000 annual limitation upon the payment of retirement benefits are as follows:

A. *Facts Relating to Penn Central Retirement Programs*

Although the CCP provides payments to the participants after their retirement, it is not the exclusive, nor the primary, source of retirement benefits payable to retired employees of Penn Central. On the contrary, it is a program the participation in which was limited to a select group of highly compensated executives of Penn Central which was established for purposes different than those giving rise to the normal pension plan. The retirement benefits payable under the CCP are merely incidental to its primary purpose of deferring receipt of a portion of the participants' compensations and are supplemental to the retirement benefits payable to the participants both under the Railroad Retirement Act, 45 U.S.C. §228(a), and under Penn Central's general retirement programs.

Aside from the Railroad Retirement Act, which covers all of Penn Central's employees, the basic pension plan applicable to Penn Central's employees, principally those not covered by collective bargaining contracts, is the funded Supplemental Pension Plan. The benefits under this Plan, are payable out of a trust funded primarily by contributions made by Penn Central and its predecessors.

Note 3—*Continued*

James M. Symes (No. 73-1039), of a special pension of $10,000 a year, in addition to his pension of $52,776 payable under the Supplemental Pension Plan, awarded several years *after* his retirement.

The Supplemental Pension Plan is augmented by a number of other programs which are more limited in scope and coverage and which provide benefits payable directly by Penn Central. These include, insofar as relevant hereto:[4]

(a) The Policy of June 28, 1961, which provides retirement benefits, in addition to those payable under the Supplemental Pension Plan, to employees whose employment began subsequent to their thirty-fifth birthday and who earned $20,000 or more a year to reflect prior service (up to a maximum of twenty years) with another railroad or other company.

(b) Supplement A to the CCP which provides retirement benefits, also in addition to those payable under the Supplemental Pension Plan, to participants of the CCP who retired between August 1968 and June 1970 based upon the participants' contingent compensation allotments.

Almost all of the petitioners continue to receive substantial pensions under the Supplemental Pension Plan based upon their years of service and compensation, and a number further receive additional benefits under one or more of the other Penn Central retirement programs. No appeal has been effected from that portion of Order No. 1087 authorizing the continuation of these programs.

B. *Facts Relating to Contingent Compensation Plan*

The CCP was established by Penn Central's predecessor, The Pennsylvania Railroad Company, on November 26, 1952. Under the CCP, Penn Central awarded to those employees selected as participants, limited to executives

4. The remaining unfunded retirement plans maintained by Penn Central are as follows: New York Central Railroad Company unfunded Supplementary Pension System; New York, New Haven and Hartford Railroad Company unfunded pension plan; Penn Central Interim Pension Policy.

and professionals having annual cash salaries in excess of $30,000, allotments of contingent compensation in addition to their regular salaries. This contingent compensation was not payable immediately in cash but rather in ten annual installments after the termination of the participant's employment or attainment of age 65, whichever was later, or in a lump sum or installments (depending upon time of death) to the participant's beneficiary or estate upon death. Until paid, all amounts allocated under the CCP are subject to forfeiture under certain circumstances. Amounts allotted under the CCP were treated as operating expenses of Penn Central but were not reported as compensation paid to the participants, nor were they then taxable as income to the participants.

The CCP authorized, *but did not require*, the establishment of the Reserve Fund, as a separate fund to be maintained by Penn Central into which amounts equal to the contingent compensation allotments could be transferred for the purpose of investment and providing a source for the payments to participants when due under the CCP. The Reserve Fund was established concurrently with the adoption of the CCP and amounts equal to the contingent compensation allotments were transferred thereto monthly by Penn Central. All of the assets of the Reserve Fund were derived solely from these monthly payments by Penn Central. *No monies were ever paid to the Reserve Fund by the participants.*

Under the CCP, the amount of each participant's interest in the Plan was stated in terms of units of the Reserve Fund, the value of which would increase or decrease depending upon the growth of the fund by way of income and unrealized gain. All payments to be made to a participant at retirement were to be based upon the value of the participant's units in the CCP at the time of payment.

In June 1970, the Board of Directors of Penn Central suspended the operation of the CCP and no further contingent compensation allotments have been allocated to the participants since that time. Moreover, since the institution

of the reorganization proceedings on June 21, 1970, no payments have been made out of the Reserve Fund to the participants.

Order No. 1087 provides for the payment to the participants of that portion of their interests in the CCP as of December 31, 1970 equal to the principal amount of their contingent compensation allotments less any payments previously made under the Plan, subject to the $50,000 per annum limitation. The balance of the participants' interests in the CCP represents the appreciation in value of the investment of the Reserve Fund together with most of the unpaid contingent compensation allotments of the six participants whose annual payments are restricted to $50,000.

The petitioners herein were high salaried executives, most of whom participated in the CCP from its inception and whose accounts in the Plan increased substantially in value over the amount of their contingent compensation allotments as a result of the favorable investment by Penn Central of the assets of the Reserve Fund. In some cases, the sums already distributed to these participants far exceed the amounts originally allocated to their accounts.

C. *Facts Relating to $50,000 Per Annum Limitation*

The $50,000 per annum limitation upon the payment of unfunded retirement benefits imposed by the Reorganization Court affects only six former executives of Penn Central, four of whom are petitioners herein. The effect of Order No. 1087 on the payment of benefits to these four individuals is as follows:

1. James M. Symes (No. 73-1039)

Under Order No. 1087, petitioner Symes is entitled to receive his full benefits under the funded Supplemental Pension Plan in the annual amount of $52,776.12. The $50,000 limitation affects the current payment of an additional $10,000 pension awarded to him five years after

retirement and which is *not* funded. Mr. Symes was further denied preferential payment of the $190,505 remaining in his account in the CCP. This results both from the $50,000 per annum limitation and from the fact that the payments to him under the Plan prior to reorganization, $440,451.64, far exceeded the amount of his allotments, $251,096.23.

2. David C. Bevan (No. 73-854)

Under Order No. 1087, the annual benefits payable to petitioner Bevan have been limited to $50,000, of which $22,562.76 is paid by Penn Central directly from current operating receipts, the balance of $27,437.28 being paid under the funded Supplemental Pension Plan. The principal effect of this limitation is to reduce the benefits currently paid to Bevan under the Policy of June 28, 1961 and Supplement A to the CCP and to eliminate current payments to Bevan of the sums credited to his account in the CCP.

2. David E. Smucker (No. 73-1039)

Under Order No. 1087, the annual benefits payable to petitioner Smucker have been limited to $50,000, of which $9,693.96 is paid by Penn Central directly from current operating receipts, the balance of $40,306.08 being paid under the Supplemental Pension Plan. The principal effect of this limitation is to reduce minimally the unfunded retirement benefits currently paid Smucker under Supplement A to the CCP and to eliminate all current payments to him under the CCP.

4. Allen J. Greenough (No. 73-964)

Under Order No. 1087, petitioner Greenough is entitled to receive his full pension under the Supplemental Pension Plan in the annual amount of $68,478.60. The $50,000 limitation affects only the current payment of that portion ($22,140.87) of Mr. Greenough's contingent compensation allotments, which were in the total sum of $222,140.87, in excess of the $200,000 already paid to him

under the CCP prior to reorganization. Mr. Greenough was further denied preferential payment of the balance of his interest in the CCP, in the amount of $541,335.55, representing increases in the value of the Reserve Fund, on the basis of the formula applicable generally to the participants.

REASONS FOR DENYING THE WRIT

1. The Reorganization Court Properly Exercised Its Discretion in Denying Preferential Payment to the Participants of Their Full Interests in the CCP.

The courts below recognized, as do the Trustees, that petitioners have legitimate executory contractual claims against Penn Central under the CCP.[5] These claims arise out of "services" rendered Penn Central *prior* to the institution of the reorganization proceedings. As a general rule, unsecured claims of this nature are not entitled to preferential payment during the reorganization proceedings, but are subject, as are other pre-reorganization claims, to determination as part of the proof of claim procedure and to disposition as part of the plan of reorganization.[6] As noted by the Court of Appeals, this is true whether or not petitioners' rights under the CCP became vested upon their respective retirements.[7]

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5. The Reorganization Court did not hold, as intimated by petitioner Bevan that this contractual claim was in any way affected by the establishment of the Reserve Fund. It merely determined that the CCP did not create any property rights in favor of Bevan in the Reserve Fund which would justify a preferential payment to him of his contractual claim. This misinterpretation of the Reorganization Court's decision, as well as many of the other statements and arguments made in the Petition at No. 73-584 are the result of Bevan's inability or refusal to accept the simple rule of bankruptcy law that unsecured contractual claims for services rendered prior to reorganization are not entitled to preferential payment during reorganization.

6. *Frasher v. Robinson*, 458 F.2d 492 (9th Cir. 1972); *Kooy v. Van Winkle*, 88 F.2d 181 (3d Cir. 1937).

7. The cases cited by petitioner Greenough at pages 9-11 of his petition merely hold that a pensioner has a vested contractual right to retirement benefits under a pension plan which cannot be terminated by the employer in the absence of a bankruptcy or reorganization proceeding. They do not purport to discuss the rights of a pensioneer as an unsecured creditor in a proceeding of this character and are not relevant to the issues before this Court.

The Reorganization Court, having concluded that the rights of Penn Central's retired employees under the CCP were merely contractual in nature, nevertheless authorized the preferential payment of limited benefits thereunder in accordance with the principles enunciated in *Bowen v. Hockley*, 71 F.2d 781 (4th Cir. 1934) and *Tate v. New York, N.H. & H.R.R.*, 332 F.2d 449 (2d Cir. 1964). These cases reflect a practice by railroad reorganization courts under Section 77 of the Bankruptcy Act, 11 U.S.C. §105, to authorize the continued payment of unfunded pensions falling due under a railroad's regular pension program.[8]

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8. In *Tate v. New York, N.H. & H.R.R.*, 332 F.2d 449 (2d Cir. 1964), the Court of Appeals reversed an order of the District Court in a railroad reorganization proceedings, which terminated payments to a retired executive of the railroad under a special contract providing reasonable retirement benefits ($13,000 a year) substantially similar to those payable under the railroad's formal pension plan, except that credit was given to him for service with a prior employer. The executive, in leaving his former employer, had forfeited all of his pension rights to date of termination, and it is a standard practice in the railroad industry to provide credit for prior service under such circumstances.

In *Bowen v. Hockley*, 71 F.2d 781 (4th Cir. 1934), the Court extended the rule to permit the continued payment during an equity receivership of a disability benefit awarded an injured employee prior to the institution of the proceedings under a state workmen's compensation statute. The debtor was self insured under the statute and the direct payments to the injured employee were considered to be in the same category of necessary operating expenses payable currently as would premium payments to an insurance company for coverage against future compensation awards during the receivership.

But, see *Alpert v. New York, N.H. & H.R.R.*, 348 F.2d 304 (2d Cir. 1965), where the Court of Appeals for the Second Circuit affirmed the denial of sums due a railroad's retired chief executive officer under his employment contract which provided for payment of $25,000 a year after retirement "by way of deferred compensation". The Court of Appeals drew a sharp distinction between contracts like Tate's, providing a pension similar to that payable under the railroad's regular pension plan, which should be paid for the purpose of maintaining and facilitating employee loyalty, incentive and recruitment, and contractual provisions for deferred compen-

The preferential payment of retirement benefits under *Tate* and *Bowen* is based upon the equitable factor of employee morale and not upon the contractual rights of the retired employees. Thus, the amount of pension authorized to be paid is not fixed by the terms of the contract or pension plan, but must be determined independently by the district court on the basis of equity and fairness under the circumstances. *Tate v. New York, N.H.&H.R.R.*, 332 F.2d at 452. Consistent with this teaching, the Reorganization Court, within its discretion, authorized the current payment of that portion of the participants' interests in the CCP attributable to the contingent compensation allotments (less prior payments under the CCP) and deferred consideration of the balance of their claims attributable to the increased value of the assets of the Reserve Fund until the adoption of a plan of reorganization.

In view of the extraordinary nature and limited coverage of the CCP and the fortuitous nature of the investment experience of the Reserve Fund, the Reorganization Court cannot be held to have abused its discretion in this regard. Petitioners have presented no sound reasons in any of their petitions for this Court to review the exercise of that discretion.

2. The Participants Have No Property Interests in the Assets of the Reserve Fund.

One of the arguments asserted in the Court of Appeals, and repeated by petitioners Bevan and Greenough

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Note 8—*Continued*

sation unrelated to the normal pension formula and serving none of these purposes. See also *Pyrites Co. v. Silica Gel Corp.*, 8 F.Supp. 423 (D.Md. 1934) (pre-receivership compensation denied to executives; granted to other employees); *In re Compania De Los Ferrocarriles De Puerto Rico*, 76 F.Supp. 521 (D.P.R. 1948) (pension discontinued as to executives; continued as to employees covered by labor contract); *In re Schenectady Ry.*, 93 F.Supp. 67 (N.D.N.Y. 1950) (pension suspended as to executives; continued as to employees covered by labor contract).

herein, is that they have more than mere unsecured contractual claims against Penn Central's estate. Rather, they assert a beneficial property interest by way of a trust—express, constructive or resulting—in the specific assets of the Reserve Fund and contend the courts below have improperly deprived them of their rights to those assets contrary to the decisions of this Court.[9]

The complete answer to petitioners' position in this respect is found in the CCP itself. Section 401 of the CCP provides:

> The Fund shall not be a trust fund and the assets therein shall be available at all times for any corporate purpose of the Company. A participant shall have no right in or to any funds or property which may be held in the Fund.

Section 1201 further provides:

> No participant nor any other person shall have any interest in any fund or in any specific asset or assets of the Company by reason of amounts contingently allotted to him. . . .

This language is as clear as can be and, as held by the courts below, sufficiently negates the existence of a trust relationship with respect to the Reserve Fund.[10] An ex-

9. The petition in No. 73-584 relies upon the decision in *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962). In *Pearlman*, this Court held that a Miller Act surety which had paid its principal's laborers and materialmen had an equitable claim for reimbursement out of the amounts retained by the United States to secure such payments, and that the principal's trustee in bankruptcy had acquired no property rights in the fund to the extent of the surety's equitable interest. The basis for the *Pearlman* decision, and all of the other decisions cited by petitioners Bevan and Greenough, is an identifiable fund or property in which the claimant can show a property interest, legal or equitable, superior to that of the bankrupt. As hereinafter discussed, petitioners did not have any property interest in the assets of the Reserve Fund entitling them to priority of payment of their entire interests in the CCP.

10. It is no answer to state, as Bevan has to this Court, that the clause making the assets available to Penn Central demon-

press trust cannot arise unless there has been an outward manifestation of intent on the part of the alleged settlor that the property should be held in trust (I Scott, Trusts §23, at pp. 190-91, §74.3, at p. 682 (3d ed. 1967)). *A fortiori*, there can be no trust relationship where the purported settlor has stated that no trust relationship is intended by his actions.

There was, moreover, no conduct on behalf of Penn Central contrary to the terms of the CCP. The Reserve Fund remained at all times in the custody of Penn Central's Treasurer available for corporate purposes, and was accounted for as an asset of the company. The mere fact that the officers of Penn Central, almost all of whom were participants, did not take advantage of the right to use the property in the Reserve Fund for general railroad purposes does not indicate that the intent of the Board of Directors was contrary to that expressly set forth in the CCP, nor does it indicate that the status of the property of the Reserve Fund was other than a corporate asset.

Petitioner Bevan's assertion that there is a resulting or constructive trust in the Reserve Fund, notwithstanding the terms of the CCP, because the contingent compensation allotments transferred thereto were the participants' property begs the question. The participants made no contributions of cash or property. Rather, in lieu of receiving their total compensation in the form of immediate cash salaries, they acquired contractual rights against Penn Central to receive deferred compensation after retirement to be measured by their interests in the Reserve Fund.

It is clear that the assets of the Reserve Fund remained at all times the sole property of Penn Central and were not

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Note 10—*Continued*

strates that the assets were not in fact the property of Penn Central, absent specific language to that effect. The respective rights of the participants and Penn Central to these assets can be based only upon the express provisions of the CCP, and petitioners can have no greater rights than are conferred under these provisions. *Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527 (3d Cir. 1970).

held in trust for the participants. As a consequence, the participants have no claim to these assets, but merely have a contractual right against Penn Central's estate. The decision of the Courts of Appeals denying participants' claim for priority is therefore not inconsistent with any decision of this Court and should not be reviewed by this Court.

3. The Reorganization Court Properly Exercised Its Discretion in Imposing the $50,000 Per Annum Limitation Upon the Payment of Unfunded Retirement Benefits.

The Reorganization Court in authorizing the preferential payment out of the Penn Central estate of unfunded pension benefits (including the partial payments under the CCP) limited the amount of benefits payable to any one former employee to $50,000 per annum. This limitation, affirmed by the Court of Appeals, is fair and equitable, and constitutes a proper exercise of the Reorganization Court's discretion which need not be reviewed by this Court.

The reasonableness of the $50,000 limitation is demonstrated by the analyses of the federal income tax returns filed for the years 1968 and 1969, published by the Internal Revenue Service,[11] which disclose that 99.6% of the wage earners filing returns reported adjusted gross incomes of less than $50,000 and an even greater proportion, 99.85%, in 1968, reported salaries or wages, as distinguished from total income, of less than $50,000.

An annual income of $50,000 should provide sufficient funds to maintain a comfortable standard of living, par-

11. Internal Revenue Service, Statistics of Income-1968, Individual Income Tax Returns, p. 27, Table 1.9 (1971); Internal Revenue Service, Statistics of Income-1969, Individual Income Tax Returns, p. 13, Table 1.4 (1971). The analysis of the federal income tax returns for the year 1970 discloses a similar percentage, 99.4% of total tax payers, as distinguished from wage earners, reporting adjusted gross income of less than $50,000. Internal Revenue Service, Statistics of Income-1970, Individual Income Tax Returns, Table 1 (1973). See also Fox, Top Executive Pensions-1969, The Conference Board Record, Vol. VIII, No. 1, January 1971.

ticularly in retirement when a family's responsibilities are generally less. In view of the present financial condition of Penn Central, it would be highly inequitable to provide over-generous payments to retired employees out of Penn Central's estate while other claimants, many in hardship situations, are receiving nothing. As noted by the Reorganization Court, ". . . it would be unconscionable to permit the payment in full of all retirement and deferred compensation, no matter how generous the amount, while [Penn Central] is unable to pay current taxes. . . ."

The only specific challenge as to the fairness of the $50,000 limitation is petitioner Bevan's complaint that it discriminatorily limits payments out of Penn Central's estate to six executives while permitting full payment to all other retired employees of Penn Central under Penn Central's unfunded pension programs. As noted by the Reorganization Court, Bevan's suggestion that any limitation on payments should be on a pro-rata basis ". . . would . . . involve greater inequities than the flat limitation. . . ." and ". . . might make it difficult for retirees at the lower end of the scale to maintain themselves comfortably. . . ."

Petitioners have not stated any other ground for determining that the limitation is inequitable or that the Reorganization Court otherwise abused its discretion.[12] This Court, therefore, should not exercise its extraordinary jurisdiction to review that discretion.

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12. Petitioner Bevan, in arguing further that the $50,000 annual limitation constitutes an abuse of the Reorganization Court's discretion as applied to his interest in the CCP, merely reiterates the contentions made elsewhere in his petition that the assets of the Reserve Fund were the property of the participants, not Penn Central. As hereinbefore stated, the Courts below correctly decided that Bevan's rights under the CCP were solely contractual in nature and not entitled to any preferential treatment. This denial of preferential payment was without prejudice, however, to Bevan's right to assert his claim thereunder as part of the proof of claim procedure instituted in the reorganization proceedings.

CONCLUSION

For the above reasons, it is submitted that the refusal by the Reorganization Court to grant petitioners preferential payment of their entire interests in the CCP is not inconsistent with any decision of this Court, and that the limitation imposed upon the payment of unfunded retirement benefits payable to petitioners did not constitute an abuse of the Reorganization Court's discretion. The affirmance of Order No. 1087 by the Court of Appeals was therefore correct and need not be reviewed by this Court. The Petitions for Writs of Certiorari filed by petitioners should be denied.

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